Golden Court Hotel v Pejabat Pemegang Harta Malaysia & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL ACTION NO 22-109-94
MOHD GHAZALI J
31 JULY 1995

Land Law *— Lease — Unregistered — Whether chargee (now owner) bound by lease agreement — Estoppel*

Equity *— Estoppel — Whether it must be pleaded — Whether it was a rule of evidence or a cause of action*

The plaintiff operated a hotel on several floors of a commercial building which was formerly owned by the trustees of UMNO. They had charged the property to the second defendant in 1981 and a second charge was made in 1984. When UMNO was cancelled as a registered society in 1988, all its assets vested in the Official Assignee (OA), the first defendant. Payments due to the bank stopped and in May 1989 there were several meetings between the bank and the OA. Meanwhile the OA rented seven floors in the building to the plaintiff and on 1 May 1989 entered into a lease agreement for 15 years. In November 1989 the OA asked the bank for the document of title so the lease could be registered to comply with the National Land Code. The bank did not reply. Despite this, the OA and plaintiff executed a lease of land pursuant to s 221 of the National Land Code. In February 1990 the bank told the plaintiff's solicitors that the chargor could not create a lease over the property without its written consent. The bank also informed the OA that it would agree to a lease only for five years if the rental was assigned to the bank. After various meetings, a deed of assignment was entered into between the OA and the bank in February 1991, under which the bank agreed to release the document of title so the lease could be registered in consideration of the rental due from the plaintiff being assigned to the bank. However, in April 1992, the bank told the plaintiffs it would not release the title deed although the plaintiff had paid rent to the bank. In 1991, the bank had foreclosed against the chargor, and in 1993 it bought the property at an auction. In 1994, the plaintiff commenced this action, seeking a declaration that the bank was bound by the 1989 lease agreement. At trial the OA officer who handled the matter testified that the bank impliedly consented to the terms of the lease in May 1989. A bank official, however, testified it did not know about the lease agreement at first, and when it did, it was unaware that it was for 15 years. The deed did not mention a 15-year lease and he claimed the bank signed it on the basis it was for five years. The plaintiff sued the bank as successor in title to the owners, not as chargee and said as it had collected the rent from the plaintiff it was estopped by waiver and acquiescence from saying when they were

chargees they did not consent to the granting of the lease by the OA. At issue was whether the bank; was a stranger to the lease and therefore not bound by it; whether the lease was void as there was no written consent by the bank, whether the bank was estopped from denying it had consented; and whether there was waiver and acquiescence by the bank when it signed the deed and accepted the plaintiff's rent.

Held, granting the declaration:

(1) The plaintiff was not suing on the lease agreement as such, but was claiming a right established under the lease that the bank was obliged to recognize it as a lessee. Privity of contract was irrelevant.

(2) On the balance of probabilities, consent was given by the bank in May 1989 to the lease. The plaintiff's evidence that the bank knew about the OA's intention to grant a 15-year lease in May 1989 was credible. Given the OA's functions, the OA would not enter into a lease without the consent of the chargee even though consent was not in writing.

(3) In these circumstances the bank's contention that consent must be in writing could not stand. The bank's conduct was suspect throughout the transaction. Its claim that it thought the lease was for five years when it executed the deed did not hold water.

(4) The bank acquiesced to the OA's actions. It received monthly rental from the plaintiff which meant it recognized the plaintiff as a lessee. The bank could not now contend, because it was not a party to the lease, that the plaintiff was not entitled to the declaration sought.

(5) Even though the lease is void for want of registration, equity would aid the plaintiff and the bank was estopped from denying the plaintiff's right under the lease.

(6) Estoppel did not need to be pleaded. It was a rule of evidence not a cause of action.

(7) An equity was created when the plaintiff spent money on the property in the expectation that the bank would consent to the granting of the lease by the OA. As purchaser, the bank had notice of the lease and could not deny the plaintiff had an interest in the property. The plaintiff was therefore also entitled to an order of specific performance.

(8) The plaintiff had suffered no damage but the bank must pay the plaintiff's costs.

[Bahasa Malaysia summary

Plaintif mengendalikan sebuah hotel di beberapa tingkat di bangunan komersial yang sebelumnya dipunyai oleh pemegang amanah UMNO. Mereka telah membuat gadaian harta itu kepada defendan kedua

dalam tahun 1981 dan gadaian kedua telah dibuat dalam tahun 1984. Apabila UMNO telah dibatalkan sebagai persatuan yang berdaftar dalam tahun 1988, semua aset-aset terletakhak dalam Pegawai Pemegang Harta (PPH), defendan pertama. Bayaran yang perlu dibayar kepada bank terhenti dan pada bulan Mei 1989 terdapat beberapa perjumpaan di antara bank dan PPH. Sementara itu, PPH menyewakan tujuh tingkat dalam bangunan itu kepada plaintif dan pada 1 Mei 1989 mengikat suatu perjanjian pajakan untuk 15 tahun. Pada bulan November 1989 PPH meminta daripada bank dokumen hakmilik supaya pajakan itu boleh didaftarkan untuk mematuhi Kanun Tanah Negara. Bank tidak memberikan jawapan. Walau bagaimanapun, PPH dan plaintif menyempurnakan pajakan tanah mengikut s 221 Kanun Tanah Negara. Pada bulan Februari 1990, bank memberitahu peguam plaintif bahawa penggadai tidak boleh mewujudkan pajakan ke atas harta itu tanpa kebenaran bertulis daripadanya. Bank juga memberitahu PPH bahawa ia hanya akan bersetuju untuk pajakan selama lima tahun sahaja jika sewa diserahhak kepada bank. Selepas beberapa perjumpaan, suratikatan penyerahhakan telah dimasukkan di antara PPH dan bank pada bulan Februari 1991, di mana bank bersetuju untuk melepaskan dokumen hakmilik supaya pajakan itu boleh didaftarkan sebagai balasan kepada sewa yang perlu dibayar oleh plaintif diserahhakkan kepada bank. Bagaimanapun, pada bulan April 1992, bank memberitahu plaintif ia tidak akan melepaskan dokumen hakmilik walaupun plaintif telah membayar sewa kepada bank. Pada tahun 1991, bank telah menutup gadai janji terhadap penggadai, dan dalam tahun 1993 ia membeli harta itu di suatu lelongan. Pada tahun 1994, plaintif memulakan tindakan ini, menuntut deklarasi bahawa bank adalah terikat dengan perjanjian pajakan tahun 1989. Pada masa perbicaraan, pegawai PPH yang mengendalikan perkara itu memberikan keterangan bahawa bank bersetuju secara tersirat kepada terma-terma pajakan pada bulan Mei 1989. Seorang pegawai bank, bagaimana pun, memberikan keterangan bahawa ia tidak tahu mengenai perjanjian pajakan pada mulanya, dan bila ia mengetahuinya, ia tidak menyedari bahawa ia adalah untuk 15 tahun. Suratikatan itu tidak menyebut pajakan untuk 15 tahun dan beliau mendakwa bahawa bank menandatanganinya atas dasar ia adalah untuk lima tahun. Plaintif menyaman bank sebagai pengganti hakmilik kepada pemunya, bukan sebagai pemegang gadaian dan mengatakan oleh kerana ia telah mengumpulkan sewa daripada plaintif, ia diestop oleh penepian dan akuiesens daripada mengatakan apabila mereka merupakan pemegang gadaian, mereka tidak bersetuju kepada pemberian pajakan oleh PPH. Yang menjadi isu adalah sama ada bank adalah pihak yang asing kepada pajakan itu dan oleh itu tidak terikat dengannya; sama ada pajakan itu terbatal kerana tidak ada kebenaran bertulis dari bank; sama ada bank diestop daripada menafikan ia telah bersetuju; dan sama ada terdapat penepian dan akuiesens oleh bank apabila ia menandatangani suratikatan itu dan menerima sewa plaintif.

A B C D E F G H I

Diputuskan, membenarkan deklarasi itu:

(1) Plaintif tidak menyaman di atas perjanjian pajakan, tetapi menuntut hak yang dibentuk di bawah pajakan itu bahawa bank bertanggung jawab untuk mengakuinya sebagai penerima pajakan. Priviti kontrak adalah tidak relevan.

(2) Di atas imbangan kebarangkalian, persetujuan diberikan oleh bank dalam bulan Mei 1989 kepada pajakan itu. Keterangan plaintif bahawa bank tahu mengenai hasrat PPH untuk memberikan pajakan 15 tahun pada bulan Mei 1989 adalah boleh dipercayai. Memandangkan fungsi-fungsi PPH, PPH tidak akan memasuki pajakan tanpa persetujuan pemegang gadaian walaupun persetujuan itu tidak bertulis.

(3) Dalam keadaan-keadaan ini, tegasan bank bahawa persetujuan mestilah bertulis tidak boleh disokong. Kelakuan bank mencurigakan sepanjang transaksi itu. Dakwaannya bahawa ia fikir pajakan itu adalah untuk lima tahun apabila ia menyempurnakan suratikatan itu tidak boleh dipercayai.

(4) Bank telah memberi akuiesens kepada tindakan PPH. Ia menerima sewa bulanan daripada plaintif yang bermakna ia mengakui plaintif sebagai penerima pajakan. Bank tidak boleh sekarang menegaskan oleh kerana ia bukan pihak kepada pajakan, bahawa plaintif tidak berhak kepada deklarasi yang dituntut.

(5) Walaupun pajakan itu batal kerana tidak didaftarkan, ekuiti akan membantu plaintif dan bank diestop daripada menafikan hak plaintif di bawah pajakan itu.

(6) Estopel tidak perlu diplid. Ia adalah satu peraturan keterangan, bukan kausa tindakan.

(7) Ekuiti diwujudkan apabila plaintif membelanjakan wang ke atas harta itu dengan jangkaan bahawa bank akan bersetuju kepada pemberian pajakan oleh PPH. Sebagai pembeli, bank mempunyai pengetahuan mengenai pajakan itu dan tidak boleh menafikan plaintif ada kepentingan dalam harta itu. Plaintif dengan itu adalah berhak kepada satu perintah pelaksanaan spesifik.

(8) Plaintif tidak menanggung apa-apa kerugian, tetapi bank mesti membayar kos plaintif.]

Notes

For cases on quality and estoppel, see 6 *Mallal's Digest* (4th Ed) paras 1633–1660; [1989] *Mallal's Digest* 749–767; [1990] *Mallal's Digest* 595–598; [1991] *Mallal's Digest* 1058–1061; [1992] *Mallal's Digest* 925–933; [1993] *Mallal's Digest* 755–756; [1994] *Mallal's Digest* 1240–1251; [1995] *Mallal's Digest* 905-912.

For cases on leases, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1938–1985; [1995] *Mallal's Digest* 1157–1158.

Cases referred to

Caxton (Kelang) Sdn Bhd v Susan Joan Labrooy & Anor [1988] 2 MLJ 604 (folld)
Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & Ors [1984] 2 MLJ 123 (distd)
Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170 (distd)
Ong Heng Hwa Realty Sdn Bhd v Teoh Chai Siok [1977] 1 MLJ 124 (folld)

Legislation referred to

Companies Act 1965 s 236(2)
Evidence Act 1950 s 115
National Land Code ss 221, 226, 272
Societies Act 1966 s 17(1)(e)

Yap Siong Cheng (*Arthur Lee & Co*) for the plaintiff.
Noreen Badarudin (Peguam Persekutuan) for the first defendant.
V Kumar (*Albar Zulkifly & Yap*) for the second defendant.

Cur Adv Vult

Mohd Ghazali J: The plaintiff to this action is seeking the following reliefs, namely:

(i) a declaration that the second defendant is bound by a lease agreement dated 1 May 1989;

(ii) specific performance of the said lease agreement;

(iii) damages;

(iv) costs; and

(v) any other relief as the court may deem fit.

The background to this action is as follows. The property which forms the subject-matter of this action is a piece of land known as HS(D) 5192 PTD 2696, Mukim Pagoh, in the District of Muar comprising an area of 3329.64 square metres ('the said property') upon which is a 12 storey commercial building known as Bangunan UMNO, Bahagian Muar, Pagoh ('the said building').

On 23 December 1981, the registered proprietors, namely, the trustees of UMNO, Bahagian Muar, Pagoh, charged the said property to the second defendant ('the bank'). A second charge over the said property and made between the same parties was subsequently created on 8 August 1984.

However, upon the cancellation of UMNO as a registered society in 1988, in accordance with s 17(1)(e) of the Societies Act read together with s 236(2) of the Companies Act 1965, all the assets of UMNO including the said building vested in the Official Assignee, that is, the first defendant to this action ('the OA').

Upon the dissolution of UMNO, the trustees of UMNO, Bahagian Muar, Pagoh stopped its payment due under the terms contained in the charge documents and payable to the bank as a result of which several meetings were held in May 1989 between the bank and the OA with a view to settle the issue of the outstanding amounts due.

Meanwhile, the OA had decided to rent the ground and the 6th to 11th floors of the said building to the plaintiff, a company, and on 1 May 1989 both parties entered into a lease agreement ('the said lease agreement') wherein the OA leased the said floors for a term of 15 years commencing 1 May 1989 and terminating on 30 April 2004 at a monthly rental of RM12,000 for the first three years. Subsequently, on 29 November 1989, the OA wrote to the bank to inform that it had agreed to lease the said floors to the plaintiff for a term of 15 years and simultaneously requesting the bank to forward the issue document of title to enable it to register the lease in order to comply with the provisions of the National Land Code ('the Code'). The said letter (p 48 of the Agreed Bundle of Documents) reads:

> Adalah saya diarah memaklumkan bahawa Pegawai Pemegang Harta, Malaysia telah berkenan menyewakan Tingkat 6 hingga Tingkat 11 di Bangunan UMNO Pagoh kepada Tetuan Golden Court Hotel Sdn Bhd selama tempoh 15 tahun.
>
> 2 Menurut kehendak Kanun Tanah Negara, 1965 Sewaan (Pajakan) ini hendaklah didaftarkan dengan Pejabat Tanah. Bagi maksud pendaftaran tersebut, Geran berkaitan dengan harta tersebut hendaklah dikemukakan kepada Pejabat Tanah supaya catatan-catatan mengenai Pajakan ini dapat dibuat.
>
> 3 Memandangkan Geran tersebut kini berada pada tuan selaku Pemegang Cagaran, sukacita saya sekiranya dapat pihak tuan meminjamkan Geran tersebut kepada saya buat seketika waktu. Saya memberi akujanji saya akan memulangkan Geran tersebut kepada tuan sebaik sahaja urusan ini sempurna. Penyerahan Geran tersebut bolehlah dibuat kepada pegawai saya di Johor Bahru, Encik K Velautham.

The bank did not respond to that letter neither did it forward, as requested, the issue document of title thus making it impossible for the OA to take the necessary action to register the lease. Notwithstanding that the bank has not released the issue document of title, both the OA and the plaintiff executed an instrument in Form 15A entitled 'Lease of Land' pursuant to s 221 of the Code on 29 December 1989 (p 25–28 of the Agreed Bundle of Documents). However, despite requests made by the OA and also the plaintiff's solicitors, the bank did not release the issue document of title to either party. On the other hand, in spite of requests made by the bank to the OA and also the plaintiff's solicitors for a copy of the said lease agreement, neither party responded.

Subsequently by a letter dated 7 February 1990 and addressed to the plaintiff's solicitors, the bank's solicitors informed the former that it was an express provision of the charge that the chargor cannot create a lease over the said property without the written consent of the chargee and that it appears that the lease granted by the OA to the plaintiff was created without the prior consent of the bank.

Three days later, by a letter dated 10 February 1990, the bank's solicitors informed the OA that the bank would only agree to the creation of a lease if it was for a term not exceeding five years and on condition that all monthly rentals were assigned to the bank.

Further meetings were then held between the OA and the bank and consequently, about a year later, by a deed of assignment ('the said Deed') dated 14 February 1991 entered into between the OA and the bank, the bank agreed that in consideration of the assignment to the bank of all rentals due from the plaintiff to the OA, the bank would agree to release the issue document of title of the said property to the OA to enable the lease to be duly registered. The relevant clause in the said deed (p 38 of the Agreed Bundle of Documents) reads:

> In consideration of the bank agreeing to release the original title deed to the Assignor for creation of the aforesaid Lease, the Assignor as the official assignee of the said Property hereby absolutely assigns unto the bank the monthly rentals of $12,000.00 due from the Existing Tenant effective from 1st day of February, 1991 with power for the bank to sue or recover and give effectual discharge for the same in the name of the Assignor or otherwise To Hold the rents as and when they fall due unto the bank absolutely.

On 5 April 1991 the OA informed the bank's solicitors by letter that commencing February 1991 the plaintiff would pay directly to the bank the monthly rental of RM12,000 as agreed to in the said deed. By a letter dated 9 April 1991 the plaintiff's solicitors once again requested the bank to release the issue document of title but there was no response. On 16 May 1991 the plaintiff's solicitors informed the bank's solicitors that the plaintiff has deposited its cheque for RM36,000. The next day, the bank's solicitors replied as follows—

> Please be informed that we shall release the title deed to you on receipt of an undertaking from your goodselves that the same shall be returned immediately after the lease has been registered and secondly, that no restrictive condition shall be imposed which could effect our clients interest. As previously agreed, kindly confirm that the sum of RM36,000 shall be released to us on receipt of the title deed.

On 20 May 1991 the plaintiff's solicitors forwarded the said cheque of RM36,000 being rental for the months of February to April 1991 and wrote as follows:

> The payment is made pursuant to Deed of Assignment entered into between Official Assignee and your client for your client's consent to create a lease of 15 years from 1 May 1989 upon the terms and conditions therein stated.
>
> As all the relevant parties have duly signed the Lease and Deed of Assignment, the only matter left for us to attend to is to have the Lease duly registered.
>
> That being the case, you are required to forward the required title deed and other relevant documents for us to present save for registration upon our undertaking to return you the title deed upon return of same from land office.

However, there was no response to that letter for about ten months until in reply to a letter of reminder from the plaintiff's solicitors dated 18 March 1992, the bank's solicitors by a letter dated 2 April 1992 wrote as follows:

> We regret to inform you that our client is not agreeable to release the title deed for lease endorsement. Any inconvenience caused is deeply regretted.

Meanwhile in 1991 the bank commenced foreclosure proceedings against the chargor in the Muar High Court (Saman Pemula Mahkamah Tinggi Muar No 24-38 Tahun 1991). Consequently, pursuant to s 272 of the Code, the bank as chargee, vide a notice in Form 16J entitled 'Notice of Entry into Possession: By Receiving Rents' dated 19 February 1992 (pp 68–69 of the Agreed Bundle of Documents), informed the plaintiff that the chargor was in breach of the agreement in the charge and as such it was entering into possession of the said property by receiving the rents due thereon.

Subsequently, on 31 March 1993, as a result of the foreclosure proceedings, the said property was put up for auction and the bank, having been successful in the bidding, became the legal owner of the said property. By a letter dated 5 April 1993 from the bank itself to the plaintiff, the former wrote:

> We refer to the Form 16J issued on 19/2/92 and would advise that to date, we have not received the rental payment for the month of February to April 1993 totalling $36,000. Kindly arrange to remit to us the payment upon receipt of this letter.
>
> Please note that the rental payment is accepted without prejudice to our rights in not treating the 15 year lease as binding on us.

On 19 May 1993 the bank's solicitors then wrote to the plaintiff as follows:

> We have been instructed by the chargor of Bangunan UMNO Pagoh (the building) that you have failed to pay the rent for the months of April 1993 to May 1993 totalling RM24,000.
>
> As such, we have been instructed to demand from you the payment of the aforesaid sum within 7 days failing which we shall initiate eviction proceedings.
>
> This demand does not signify in any way our clients approval and or consent to the 15 years tenancy granted to you by the Official Assignee, Malaysia.

On 6 April 1994 the plaintiff filed this action against the OA and the bank. As stated earlier, by this action, the plaintiff is seeking a declaration that the bank is bound by the said lease agreement and for an order for specific performance of the said lease agreement, damages and costs.

At the trial, two witnesses gave evidence for the plaintiff, namely an officer from the Official Assignee's office (PW1) who handled the subject matter of this action and who has since retired and one of the directors of the plaintiff company (PW2).

PW1 gave evidence that after the winding-up of UMNO, the OA had to look for tenants to fill the vacant floors of the said building in order to raise funds to maintain the same as it was then its duty to do so. According to him most of the floors were vacant at that time. Subsequently the plaintiff approached the OA and offered to take a lease of the ground and the 6th to 11th floors. PW1 stated that he was aware that the said property was charged to the bank and that its consent was required before the OA could grant any lease over the said property and that being so, he held several discussions with officials from the bank which, according to him, took place in May 1989. He gave evidence that the bank was aware of the terms of the said lease but was more interested in collecting the rentals. He stated that the bank insisted that the rentals be paid to them directly so as to reduce the outstanding liabilities of UMNO Pagoh due under the said charges. PW1 then stated that after the said deed was executed on 14 February 1991, the OA no longer collected any rent from the plaintiff. He gave evidence that at all times the OA was willing to honour the terms and conditions of the said lease agreement but was unable to get it registered as the bank had by then changed its stand and did not agree to forward the issue document of title.

In cross-examination PW1 stated that at the time of the execution of the said lease agreement, the OA's office did not ask for the bank's written consent as the bank had by then given its consent via several discussions held with officers from the bank in May 1989; in other words, there was implied consent on the part of the bank. PW1 also insisted that the bank did not raise any objection towards the intentions of the OA to grant a lease to the plaintiff. He also stated that the bank was made aware, during the said discussions, of the terms of the offer made by the plaintiff to lease the said building and that the lease would be for a period of 15 years; he stressed that the bank did not raise any objection or made it an issue at those meetings.

PW1 also gave evidence that initially the bank agreed to release the issue document of title to enable the lease to be registered but subsequently refused to do so. He stated that he was surprised when the bank's solicitors wrote to the OA on 10 February 1990 (p 48 of the Agreed Bundle of Documents) to inform that the bank was only agreeable to a five year lease. Due to this change of heart, PW1 stated that the OA was put in a quandary as the lease has been granted very much earlier. PW1 then stated that as a result of that letter, the OA and the bank held further discussions which consequently led to the signing of the said deed on 14 February 1991 wherein the OA assigned to the bank all rentals due from the plaintiff commencing 1 February 1991. He gave evidence that at that point of time, the bank knew that the lease was for 15 years.

PW2, a director of the plaintiff company, gave evidence that with the consent of the OA, the plaintiff company was allowed to occupy the said building in early April 1989 as renovation works had to be carried out before the opening of the hotel; he stated that the plaintiff company

spent about RM1.3 million on the said renovation works. He also stated that the plaintiff's solicitors had advised that the bank would release the issue document of title for the lease to be registered if the rental was paid directly to the bank. He stated that the plaintiff company complied with the bank's requirement but up to date, the bank has yet to release the issue document of title to its solicitors. He stated that the plaintiff company was also given an assurance by the OA that the lease will be for 15 years.

The OA did not call any witness but two witnesses were called by the bank. DW1, a former employee of the bank and who has since retired, gave evidence that prior to 1989 he was in charge of UMNO Pagoh's account with the bank. He stated that the interest due on the said account has been accumulating as the trustees only managed to pay a sum of RM10,000 monthly to service the interest due prior to the cancellation of UMNO as a registered society but that after the takeover of the said property by the OA, the monthly payments ceased and that that was the reason why he had to seek the assistance of the OA with the hope that the monthly payments would be continued.

DW1 then alleged that in the course of the several discussions he had with the OA, he came to know that the OA had collected about RM200,000 from the tenants of the said building and that he had hoped that that sum could be released to the bank for payment into UMNO Pagoh's account. He also stated that in the course of those discussions he was informed by the OA that a party was interested in taking over the running of a hotel which he thought was already in existence in the said building. That being so, he requested PW1 for a copy of the said lease agreement but that up to the time he relinquished his responsibility over the said account, which was towards the end of 1990, he was never furnished with one.

In his evidence he referred to a letter dated 22 December 1989 (exh D4) from the OA and signed by PW1 and which was addressed to the bank for his attention; a part of the letter reads:

> Saya juga diarah menarik perhatian tuan bahawa hal-hal yang berkaitan dengan pengurusan bangunan ini adalah menjadi tanggungjawab Pegawai Pemegang Harta semata-mata. Selaku pemiutang bercagar Pihak Public bank boleh mengambil tindakan mengikut undang-undang yang sedia ada untuk menghasilkan cagarannya (to foreclose the charge). Walau bagaimana pun Pegawai Pemegang Harta sedang menimbang sama ada sejumlah wang yang berpatutan boleh dibayar kepada Public bank setiap bulan untuk mengurangkan jumlah hutang UMNO pada pihak bank. Kajian sedang dibuat tentang jumlah pendapatan dan perbelanjaan setiap bulan dan jumlah yang berpatutan yang harus dibayar kepada Public bank. Tuan akan diberitahu sebaik sahaja keputusan dibuat mengenainya.

DW1 then stated that even on that date, that is, 22 December 1989, PW1 did not inform him as to whether the OA had entered into any lease agreement and that it was at that point of time that he (DW1) requested for a copy of the said lease agreement. DW1 insisted that even at that time he did not know whether a lease had been granted by the OA. He stated that generally the bank would not have any objection

to the granting of a lease but subject to the bank studying its terms and conditions. DW1 said he retired from the bank on 13 April 1991 and that as he had, by then, been transferred to another department within the bank, he is not familiar with the said deed executed on 14 February 1991. A

DW2, an officer with the bank gave evidence that he was made aware of the subject-matter of this suit in January 1990 when he was given the responsibility to consider the OA's application to the bank for the release of the issue document of title to register a 15 year lease that the OA granted to the plaintiff. He gave evidence that by a letter dated 10 February 1990 (p 51 of the Agreed Bundle of Documents), the bank's solicitors informed the OA that the bank would only agree to the creation of the lease subject to certain terms and conditions, inter alia, that the lease should not exceed more than five years and that all monthly rentals shall be assigned to the bank for the purpose of paying into UMNO Pagoh's account. B C

DW2 admitted that he was aware of the OA's letter dated 19 November 1989 (page 48 of the Agreed Bundle of Documents) wherein the OA informed the bank that the lease has been granted; he however insisted that he did not know its terms and conditions as on that date he has yet to receive a copy of the said lease agreement. He stressed that the OA never responded to a letter dated 12 April 1990 (page 56 of the Agreed Bundle of Documents) from the bank's solicitors requesting for a copy of the said lease agreement. D E

DW2 then stated that in January 1991 he received a copy of the proposed deed of assignment prepared by the plaintiff's solicitors and noticed that there was no mention of a 15 year lease. He also stressed that his records had shown that the bank never gave its consent to a 15 year lease and that on record, the bank's solicitors had informed the OA that the bank was only agreeable to a five year lease. DW2 then stated that the bank was under some pressure to sign the said deed because the bank's follow-up with the OA since 1988 to February 1991 has yielded no payment into the loan account of UMNO Pagoh, and hence, in good faith, the bank executed the said deed. F G

He then explained that when the bank's solicitors wrote to the plaintiff's solicitors on 17 May 1991 agreeing to release the issue document of title, the bank was 'still riding on our earlier approval' that it only agreed to a lease not exceeding five years. DW2 then alleged that the bank only received a copy of the said lease agreement on 5 September 1991 and consequently, upon being briefed of its contents, the bank instructed its solicitors to inform the plaintiff's solicitors that the bank did not agree to a 15 year lease. He also stressed that the bank received the first rental payment in July 1991, amounting to RM36,000, under the impression that the lease was for five years. H

DW2 then stated that on 9 March 1992, the bank instructed its Johor Bahru branch office to write to the plaintiff (exh D5) to inform that all future rent payments received are accepted on a without prejudice basis and shall not in any way signify the bank's acceptance of the 15 year lease granted by the OA. I

In cross-examination, DW2 explained that foreclosure proceedings were instituted by the bank against the chargor as the amounts due were not being paid and that the bank had decided in late 1992 to purchase the building; he stated that the decision to foreclose was made in late 1992. He agreed that he signed the said deed on behalf of the bank but said that he did not know who, on behalf of the bank, conducted the negotiations leading to the execution of the said deed. He, however, did not agree with suggestion made by counsel for the plaintiff that the bank was aware that the said lease was for 15 years. He also denied that he knew that the said lease was for 15 years when he signed the said deed on behalf of the bank.

DW2, however, agreed that when the bank issued Form 16J on 19 February 1992 against the plaintiff due to non-payment of rental, the bank was aware of the 15 year lease. He denied that the bank had a 'change of heart' when it accepted the rentals on a without prejudice basis as the bank wanted to purchase the said property for itself. DW2 agreed with suggestion by counsel for the plaintiff that when the OA entered into the said lease agreement with the plaintiff without the bank's consent, that would be tantamount to a breach of the charge but he, however, could not explain why the bank did not immediately take any step to enforce its rights as chargee against the chargor for not obtaining the bank's prior written consent.

Consequently DW2 agreed that after the bank had successfully bid for the said property on 31 March 1993 it was still collecting the rentals from the plaintiff. He also agreed that the only way for the OA to service the account of UMNO Pagoh was to rent the said building.

Counsel for the plaintiff submitted that the evidence has shown that the bank had knowledge of the 15 year lease from the outset. He argued that the evidence shows that since May 1989, DW1, who represented the bank, had taken part in several discussions with the OA's office and that it was at those meetings that the OA informed him of its intention to lease part of the said building to a hotel-operator. Subsequently, the bank was again informed by the OA, by its letter to the bank dated 29 November 1989 (p 48 of the Agreed Bundle of Documents), that the said lease was for 15 years.

Counsel argued that at the outset, the bank never objected nor voiced out any opposition to the granting of the lease and that throughout the transaction, the bank was only interested in getting the rentals so that UMNO Pagoh's account with the bank could be serviced accordingly. He argued that even when the bank entered into the said Deed with the OA on 14 February 1991, the bank was aware that the OA had granted a 15 year lease as evidenced by correspondence referred to during the trial; he argued that even at that stage no objections were raised by the bank. Counsel stressed that it was the bank who requested that a deed of assignment be executed between the OA and the bank so that the monthly rentals could be paid directly to them.

Counsel for the plaintiff submitted that throughout the whole transaction, the bank, through DW1, was aware of the plaintiff's

existence; he pointed out that DW1 has stated in his evidence that he knew that the OA had entered into a lease agreement with someone except that he denied knowledge of its contents and also its duration. Counsel then pointed out that DW2, who signed the said deed on behalf of the bank, stated that he did not know who negotiated on behalf of the bank prior to its execution; he argued that there was no reason for the bank to sign the said deed if they did not recognize the said lease agreement entered into between the plaintiff and the OA.

In anticipation that the bank would raise it in its submission, counsel argued that s 226 of the Code is not applicable to the facts found in this action; s 226 reads:

> (1) Where any alienated land, ... is subject to a charge, the proprietor, ... shall not be capable of granting any lease, ... under this Chapter without the consent of the chargee.
>
> (2) Except where it is contained in the instrument of charge itself, the consent of a chargee to the granting of any lease or sub-lease shall be signified by his joining therein as indicated in Form 15A or 15B, as the case may be, and his consent to the granting of any tenancy shall be given in writing, signed by him or his lawfully authorised agent.

Counsel argued that in this action the bank is sued as successors in title to the trustees of UMNO Pagoh and that the bank is now not sued as chargee but as a purchaser who has notice of the lease. He submitted that after the bank had successfully bid for the said property on 31 March 1993, the bank continued to collect the rentals from the plaintiff and hence they cannot now say that when they were chargees they did not give their consent to the granting of the lease by the OA. He argued that the issue of consent is now irrelevant and that the bank is now estopped from denying that the lease is lawful as, from their actions and conduct, it is clear that there was waiver and acquiescence. He submitted that the bank's action in issuing Form 16J, which is a notice of entry into possession by a chargee against a chargor for breach of agreement as provided for under s 272 of the Code, shows that the bank recognized the lease. He further argued that even if the bank's stand is that there has been a breach of agreement by the chargor the bank did not exercise its right under cl 9 of both the agreements pertaining to the said charges but entered into the said deed and this, he submitted, is tantamount to a waiver by conduct; the said cl 29 reads:

> In the event of any breach by the Chargor of any of the agreements covenants terms stipulations and undertakings herein provided and on the part of the Chargor to be observed and performed (other than the agreement or covenant to pay the sum for the time being owing to the bank on demand as aforesaid) occurring and continuing for a period of not less than seven (7) days it shall be lawful for the bank forthwith to give notice to the Chargor under Section 254 of the National Land Code requiring the chargor to remedy the said breach within a period of not less than fourteen (14) days and service of such notice shall be effected in the same manner as a notice demanding payment of the balance due as hereinbefore provided.

In her submission, the federal counsel who appeared for the OA said that the OA was merely carrying out her duty under s 17(1)(e) of the Societies Act 1966 read together with s 236(2)(j) of the Companies Act 1965 when she granted a lease over the said property as it was her duty to look after the assets of UMNO upon its cancellation as a registered society. Section 17(1)(e) provides, inter alia, that upon the cancellation of the registration of a registered society under any provisions of the Act 'for the purposes of the winding up the affairs of the society, the Official Assignee or such other officer as aforesaid shall have all the powers which are vested in the Official Assignee by any written law relating to bankruptcy for the purpose of the discovery of the property of a debtor and the realisation therefor, and also such powers as are by any written law relating to companies vested in an official liquidator and all the provisions of the said laws relating to bankruptcy and to the winding up of companies, so far as they relate to the discovery and realisation of the property of a debtor and to the winding up of a company, shall, mutatis mutandis, apply to the winding up of the affairs of the society under this Act'; s 236(2)(j) of the Companies Act 1965 provides that the liquidator may 'do all such other things as are necessary for winding up the affairs of the company and distributing its assets'.

She then submitted that the bank has failed to substantiate its claim that the OA had a sum of RM200,000 in its coffers in May 1989 which was then due to the bank. She submitted that there was no such sum as all monies collected from the various tenants who were occupying part of the said building were spent towards the maintenance of the building as can be seen from the evidence of PW1 and the documents found in the Agreed Bundle of Documents and that that was the reason why the OA granted the lease to the plaintiff so that payments due towards the bank could be made from the rentals received from the plaintiff. She then argued that the OA wanted to comply with s 226 of the Code but was prevented from doing so as the bank refused to forward the issue document of title.

She submitted that from the evidence given by PW1 and PW2, it is clear that the bank had knowledge of the lease and had impliedly given its consent to the granting of the lease by the OA and that by its willingness to execute the said deed, the bank clearly confirms, accepted and recognized the lease. She argued that the OA's intention to comply with s 226 of the Code, namely, to register the lease, was frustrated simply because the bank refused to hand over the issue document of title.

In reply, counsel for the bank submitted that the bank was not aware of the terms and conditions found in the said lease agreement neither was it a party to the said lease agreement. He argued that the OA failed to obtain the written consent of the bank, who was the chargee, and hence had failed to comply with s 226 of the Code and that without such written consent, the bank is not bound by the said lease agreement.

Counsel further argued that there is no evidence to show that the bank was involved in the negotiations which were carried out between the plaintiff and the OA and neither is there any evidence to show that

the bank had given its consent to the lease. He argued that the negotiations between PW1 and DW1 were only with regard to the non-performing account of UMNO Pagoh.

He submitted that the evidence shows that the said lease agreement was signed on 1 May 1989 and that the said deed was signed on 14 February 1991 but the bank only received a copy of the said lease agreement sometime in May 1991; this, he argued, shows that the bank was only made aware of the terms and conditions of the said lease agreement after the execution of the said deed. Counsel conceded that the bank is bound by the terms and conditions found in the said deed but argued that there is no evidence to show that the bank knew the contents of the said lease agreement and that there is no mention anywhere in the said deed that the lease was for 15 years — furthermore an assignment can only confer benefits and not liabilities.

Counsel then pointed out that there is no such thing as an implied consent by a chargee in the granting of a lease by a chargor as that would amount to getting around the provisions of the Code which he stressed, provides that a written consent is required. He also argued that the plaintiff cannot at all raise any issue on estoppel, waiver and acquiescence as these have not been pleaded; furthermore, an estoppel cannot be raised against statutory provisions.

Looking at the above, it is clear that the bank is not seriously disputing as to whether the OA has the power to grant the said lease when it took over the assets of UMNO. Anyway, from the provisions of the Societies Act and the Companies Act referred to by federal counsel, it is clear that the OA has such power upon the cancellation of UMNO as a registered society; s 17(1)(c) of the Societies Act clearly provides that upon the cancellation of a registered society under any of the provisions of the Act, the property of the society shall forthwith vest in the Official Assignee.

In my view, the questions which have arisen in this action and which need to be determined are as follows:

(i) whether the bank's argument that it is stranger to the said lease agreement and hence is not bound by it, can stand;

(ii) whether the lease created is void in accordance with s 226 of the Code; and

(iii) whether the bank is estopped from denying that it has given its consent, as chargor, to the granting of the lease by the OA and whether there was waiver and acquiescence on the part of the bank when it agreed to sign the said deed and commenced to accept the rentals due under the lease from the plaintiff.

In contending that the bank is not bound by the terms of the said lease agreement, counsel for the bank referred to 9 *Halsbury's Laws of England* at pp 202–217 which deals with the doctrine of privity. Counsel argued that as a general rule, a contract cannot confer rights or obligations on strangers to it, ie persons who are not parties to the contract, and as a

general rule also, nobody except a party to a contract can acquire rights under it. He then stated that it is also a general rule that a contract cannot impose burdens on anybody who is not a party to it. In support of his argument that the bank is not bound by the lease agreement, he referred to the case of *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170 where the Privy Council confirmed that only parties to an agreement can sue.

I do not think that there is any dispute as to those rules of law with regard to the doctrine of privity. But then again, the doctrine is also 'subject to very many exceptions, actual or apparent, at common law, in equity or by statute' (p 209 of the said 9 *Halsbury's Laws of England*).

But then again, is the plaintiff to this action suing on the lease agreement? I do not think so. The plaintiff has informed the court that it is confining its case to para 14 of the statement of claim; para 14(1) (the pleadings are in Bahasa Malaysia) reads:

> ... Plaintif menuntut dari Defendan Kedua seperti berikut:
>
> (1) suatu deklarasi yang menyatakan Defendan Kedua adalah terikat kepada Perjanjian Pajakan yang bertarikh 1 haribulan Mei 1989 tersebut'.

According to my translation, that prayer would read in English as follows:

> ... the Plaintiff claims from the Second Defendant the following:
>
> (1) a declaration which states that the Second Defendant is bound by the said Lease Agreement dated 1 May 1989.

From my reading of that prayer, I would think that the plaintiff is actually praying for a declaration that the bank is obligated to recognize the said lease agreement and that the plaintiff is a lessee, notwithstanding that the bank is not a party to that agreement. In other words, the plaintiff is not suing on the said lease agreement as such but is claiming that a right has been established in its favour under the said lease agreement and to that extent is seeking a declaration that the bank is obligated to recognize it as a lessee. If my reading is correct, I cannot see how the issue of privity of contract can come into play here. PW1 has given evidence that the bank, during its negotiations with the OA in May 1989, knew about the OA's intention to grant an interested party a lease of 15 years of the ground and the 6th to 11th floors of the said building for the purpose of operating a hotel. He also gave evidence that the bank was aware of the terms of the said lease agreement and that the bank was only interested in the rentals; he stated that the bank insisted that the rentals be paid to them directly so as to reduce the outstanding liabilities of UMNO Pagoh. I would tend to believe PW1; the OA, in looking after the assets of UMNO, is only performing a statutory function and is clearly trying to do all things as are necessary for winding up the affairs of UMNO. Upon the cancellation of UMNO as a registered society, its property vested in the OA and the OA's functions, under such circumstances, is similar to that of a liquidator in

the winding-up of a company. The OA has now to look after and maintain the said property, collect whatever income it can realize from it and pay off the creditors wherever possible.

Under the circumstances I do not think that the OA would enter into the said lease agreement without the consent of the chargee, that is, the bank, even though that consent was not in writing or signified by its joining therein in Form 15A. Although there is nothing in the form of a written consent from the bank, based upon the evidence of PW1 and to a certain extent DW1, it is my finding that the plaintiff has proved, on a balance of probabilities, that consent was given by the bank in May 1989 although it was not in writing. DW1 has stated in his evidence that he was not concerned as to which party was interested in operating the hotel but was only interested in the rentals. I would think that his main concern was to impress upon the OA that since she is now standing in the shoes of the trustees of UMNO Pagoh, she had to continue to fulfil the obligations of the said trustees under the terms contained in the charge documents. That being so, it would be obvious that DW1 would be very interested in knowing how the OA was going to raise the funds to fulfil those obligations. Under such circumstances, I would tend to believe PW1 when he stated in his evidence that the bank was informed via those meetings held that the OA would be granting a lease of 15 years to an interested party to run a hotel within the said building and that the bank never voiced its opposition to the granting of such a lease.

Within this context, I do not think that the bank's contention that the consent must be in writing can stand. Section 226(1) of the Code provides that the chargor shall not be capable of granting any lease without the consent of the chargee and s 226(2) provides that such consent shall be signified by his joining therein as indicated in Form 15A. Both the plaintiff and the OA have executed the said Form 15A (pp 25-29 of the Agreed Bundle of Documents) but without the bank's consent signified in that document and without the issue of the document of title, neither the plaintiff nor the OA can proceed further in their attempt to register the lease.

The fact that the said lease agreement between the OA and the plaintiff was executed on 1 May 1989 is not disputed. What transpired between the OA and the bank after May 1989 and before November 1989 is not clear; however, the evidence shows that on 29 November 1989 the OA wrote to the bank informing the latter that it had entered into a 15 year lease agreement with the plaintiff and simultaneously requesting the bank to forward the issue document of title to enable it to register the lease pursuant to the provisions of the Code. As to why the OA took about seven months before requesting for the issue document of title escapes me but on the other hand, the evidence does show that the bank took more than two months to reply to that letter (which was on 10 February 1990) and even then it was in the form of a counter proposal, namely, that the bank would only agree to the creation of a five year lease and that all monthly rentals had to be

assigned to the bank. At about the same time, namely, 7 February 1990, the bank wrote to the plaintiff's solicitors informing them, or rather placing on record, that the chargor (which under the circumstances would mean the OA) could not create a lease over the said property without the consent of the bank as chargee — the message in the bank's letter to the plaintiff seems to be that the said lease agreement entered into between the OA and the plaintiff could be void although they do not say so. Anyway, there was again an inordinate pause on the part of the OA and the bank and this was for about a year. Subsequently, on 14 February 1991 the OA and the bank executed the said deed.

Be that as it may, for the bank to insist that it was under the impression that the lease between the OA and the plaintiff was for five years when it signed the said deed, to me, does not seem to hold water. The bank's conduct is suspect throughout the entire transaction; when its officers held several meetings with the OA in May 1989, its stand was that its main interest was to impress upon the OA that UMNO Pagoh's account should continue to be serviced by the income received from rentals of the said building. DW1 stated that he was informed by the OA that the latter would be renting out part of the said building to a hotel-operator but denied that he was aware that the lease would be for 15 years. When the bank executed the said deed (on 14 February 1990) it insisted that it was under the impression that the assignment relates to a five year lease. In the face of the OA's letter to the bank dated 29 November 1990, which is an agreed document, I cannot see how such a stand can hold water.

Looking at the above, I am of the view that the circumstances warrant me to find that this is one of the exceptional cases where the doctrine of privity cannot come into play. The facts show that the bank has acquiesced to what the OA has done, namely, entering into the said lease agreement; it has not actually, at the outset, raised a hue and cry about the granting of the lease. Consequently, the bank had seen to it that commencing 1 February 1991, the plaintiff had to pay the monthly rentals direct to the bank which would mean that the bank recognized the plaintiff's right under the said lease agreement and recognized that the plaintiff was a lessee. Under the circumstances I do not think that the bank can now turn around and on the basis that it was never a party to the said lease agreement contend that the plaintiff is not entitled to the declaration sought.

In *Caxton (Kelang) Sdn Bhd v Susan Joan Labrooy & Anor* [1988] 2 MLJ 604 the facts show that the plaintiff company, which had four shareholders, was in occupation of certain premises, the freehold title of which was in the joint names of two individuals, namely, the defendants. The defendants also owned the shareholdings of the plaintiff company. In July 1984 all the four shareholders of the plaintiff company sold their equitable interests to two persons who were directors of the plaintiff company. The sale of the shares was also subject to a specific covenant on the part of the defendants to allow the plaintiff company to occupy the premises for an indefinite period at a normal rental of

RM300 per month (cl 6(e)). Subsequently on 14 December 1984 the defendants, as the registered owners, entered into a sale and purchase agreement of the premises with the same two directors but the agreement fell through because the said directors were unable to pay the purchase money.

One of the declaratory orders sought by the plaintiff company was that upon the true construction of the said cl 6(e) of the agreement, it was entitled to occupy the said premises as a tenant of the defendants at the said monthly rental until such tenancy had been lawfully terminated and that the defendants were estopped from contending otherwise. At p 605, Siti Norma Yaakob J said:

> ... the defendants have argued that this action is not maintainable by the plaintiff as it is not a party to the first agreement and being a stranger cannot sue on the agreement. I do not consider that this argument holds any merit as the plaintiff is not suing on the agreement as such but is trying to establish a right given to it under the agreement and to that extent, seeks a declaration that it is a tenant of the defendants.

I find that the position of the plaintiff in the instant case is not dissimilar.

Counsel for the bank has also submitted that there is no such thing as an implied consent by a chargee as that would amount to getting around the provisions of the Code. To me, this would be similar to saying that the lease is void for want of registration. Thus, if my reading of counsel's argument is correct, the question which seems to have arisen is what is the position of the plaintiff who is relying on a void lease? Is he entitled to the declaration sought, or in other words, can the plaintiff maintain such action against the bank?

I believe this question has been answered by Syed Agil Barakbah J in *Ong Heng Hwa Realty Sdn Bhd v Teoh Chai Siok* [1977] 1 MLJ 124. In that case the plaintiffs, the registered owners of the premises, have claimed for vacant possession against the defendant (tenant). The defendant refused to quit on the expiry date of the notice to quit served on him by the plaintiffs and instead contended that the tenancy had not been terminated by such notice and averred that the tenancy was for a fixed duration of 40 years and that he was not in arrears of rent or in breach of any covenants contained in a written agreement; it was conceded by both parties that the said written agreement was executed between the defendant and the former landlords and that the plaintiff never collected the rents on the premises since they acquired it. The defendant counterclaimed and asked for, inter alia, specific performance of the said agreement and that the plaintiffs be ordered to execute a registrable lease of the land on which the said premises stood. One of the issues before the court was what was the position of the defendant who relied on a void lease. At p 125, Syed Agil Barakbah J said:

> Now, what is the position of the defendant who relies on a void lease? It is an accepted principle as held in *Margaret Chua*'s case, supra that although an agreement might be a nullity as a lease, it could be (and indeed it was in that case) a good enforceable agreement as a lease under

> which the registered proprietor had undertaken the obligation to grant a lease; it was valid as an agreement for a lease enforceable in equity. There are strong authorities both English and local which are discussed in the cases cited above. I will only deal with the relevant ones. When will equity come to the aid of the lessee in order that the principle will apply? In this regard Mohamed Azmi J in *Lee Lum Loh*'s case, supra, having discussed relevant authorities, concluded that a tenant relying on an agreement void as a lease for non-registration can only be protected in equity if he has equitable grounds. Where a person has expended money on the land of another in the expectation of being allowed to remain in occupation, induced and encouraged by the owner of the land, an equity was created such that the court will protect his occupation of the land, and the court has power to determine in what way the equity arising could be satisfied (*Inwards & Ors v Baker*).

In the same case, with regard to the contention by the plaintiff that he was not a party to the said agreement between the defendant and the former landlords, the judge said (at p 125):

> ... It is true that the plaintiff company is not a party to the said agreement. Nevertheless, in the light of what is conceded at paragraph 4 above and the fact that the defendant thereafter attorned tenancy to the new landlords and continued to pay the monthly rents pursuant to the agreement until receipt of the notice to quit, I am of the considered judgment that the plaintiffs having due notice of such tenancy agreement, are bound to abide by the covenants and conditions stated therein on their taking over of the said premises as the new landlords. ... It is the duty of the purchaser who has notice that the vendor is not in possession of the property to make inquiries from the tenant in possession and find out from him what his rights are. If he does not choose to do that then whatever title he acquires as purchaser will be subject to the title or right of the tenant in possession (per Vaughan Williams LJ in *Hunt v Luck*).

Similarly, in the instant case, I find that notwithstanding that the lease is void merely for want of registration, equity will come in to protect the right that the plaintiff has established that he is entitled to under the said lease agreement. Thus the bank is estopped from denying the plaintiff's right under the said lease agreement.

Counsel for the bank has, however, argued that the plaintiff is precluded from raising the issue of estoppel or even waiver and acquiescence as these have not been pleaded. I would tend to agree with counsel for the plaintiff that estoppel need not be pleaded and that it is merely a rule of evidence and not a cause of action. Section 115 of the Evidence Act 1950 provides:

> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

In his commentary on that section, the learned author in Sarkar's *Law of Evidence* (13th Ed) at p 115 said:

Estoppel, therefore, is not a cause of action but a rule of evidence by which a person is precluded from denying his former assertion, when there is a cause of action. As Lord Russel observed in *Dawson bank Ltd v Nippon M K Kaisha*:

> Estoppel is not a cause of action. It may, if established, assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action or (to put it in another way) by preventing a defendant from asserting the existence of some fact, the existence of which would destroy the cause of action.

In the instant case, as discussed earlier, I think the evidence clearly shows that the bank was aware at the outset that the OA had granted a lease to the plaintiff for a period of 15 years. The bank's conduct must be looked at carefully. The bank's contention that the account of UMNO Pagoh was a 'sensitive account' and that that was why they met the OA and that they were under 'some pressure' to sign the said Deed as no payment was forthcoming on that account, is irrelevant and is of no consequence.

Furthermore, when they purchased the said property, they did it with their eyes open. They knew that the OA had granted a 15-year lease to the plaintiff but yet, for reasons better known to themselves, refused to forward the issue document of title and waited for the opportune moment (in late 1991) to file foreclosure proceedings which they could have done even before the cancellation of UMNO as a registered society.

Similarly, when the bank entered into the said deed they went in with their eyes wide open in the sense that they knew that the said lease referred to therein was for 15 years. What they were interested in were the rentals and when the deed came into effect, they commenced to collect the rentals and only subsequently informed the plaintiff that the rents were received on a without prejudice basis. From the evidence it would seem when the bank placed on record that they were collecting the rentals on a without prejudice basis and that it was collected on the understanding that the lease was for a period of five years, that stand or assertion seems to have been motivated by the fact that they wanted to commence foreclosure proceedings and bid for the said property upon the Court granting an order for sale. It is my view they are estopped from denying the plaintiff's rights under the said lease agreement. When they entered into the said deed, they recognized that the plaintiff was the lessee referred to in the said deed but when they subsequently became the registered proprietors of the said property, they set up the contrary of their assertion found in the said deed.

Consequently I cannot see any merit with regard to the contention by counsel for the bank that there is no such thing as an implied consent by a chargee as that would amount to getting around the provisions of the Code which provides that a written consent is required and that an estoppel cannot be raised against statutory provisions. The Federal Court have recognized that in the field of property law, equity is a potent protection of private rights and that you can import equity

under appropriate circumstances except that you cannot raise an estoppel to prevent a statutory body exercising its statutory discretion or performing its statutory duty. In *Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & Ors* [1984] 2 MLJ 123, with regard to this issue, Abdoolcader FJ said (at p 128):

> On the matter of the concept of equitable estoppel in public law, we would refer to the decision of the House of Lords in *Newbury District Council v Secretary of State for the Environment* in which Lord Fraser of Tullybelton deprecated (at p 606) the introduction of 'an estoppel or bar, personal to the particular party, which is quite inappropriate in this field of law, which is concerned with rights that run with land', and he went on to add that to do so would lead to uncertainty and confusion'. Lord Scarman in the course of his speech said (at p 616): In the field of property law, equity is a potent protection of private rights, operating upon the conscience of those who have notice of their existence. But this is no reason for extending it into the public law of planning control, which binds everyone', and he continued (at p 617): 'My Lords, I agree with the view so consistently expressed by Lord Parker CJ, that it is wrong to introduce into public administrative law concepts such as equitable estoppel which are essentially aids to the doing of justice in private law.

The plaintiff in the instant case is not raising an estoppel to get around the provisions of the Code with regard to the requirements of the law which have to be complied with under the Code before a lease can be registered but is claiming that because he has established his right under the said lease agreement, the existence of which the bank had notice of, the bank should be compelled to do the necessary so that the lease can be registered in accordance with the provisions of the Code. It is clear that the plaintiff and the OA cannot register the lease pursuant to the provisions of the Code without the bank signifying its consent by joining therein in Form 15A. Under the circumstances, I cannot see how one can preclude equity from coming in to protect the plaintiff's right which it has established as the estoppel raised has nothing to do with getting around the provisions of the Code.

In *Caxton (Kelang) Sdn Bhd v Susan Joan Labrooy & Anor* (referred to earlier), with regard to declaratory judgments, Siti Norma Yaakob J said (at p 605):

> PW Young in his book on *Declaratory Orders*, 2nd Ed, defines a declaratory judgment as one that does not involve a cause of action in the usual sense and that six factors must be present before there can be a declaratory order. These are:
>
> (1) There must exist a controversy between the parties.
>
> (2) The proceedings must involve a 'right'.
>
> (3) The proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which is usually referred to as 'standing' or 'locus standi'.
>
> (4) The controversy must be subject to the court's jurisdiction.
>
> (5) The defendant must be a person having a proper or tangible interest in opposing the plaintiff's claims.

(6) The issue must be ripe, ie, it must not be of academic interest, hypothetical or one whose resolution would be of no practical utility.' A

In my view, all these conditions have been met by the plaintiff and that being so, it is my decision that he is entitled to the declaratory order sought, namely, that the bank is bound by the said lease agreement.

It is also my finding that an equity was created when the plaintiff B expended money on the said property in the expectation that the chargee, ie the bank, will finally grant its consent to the granting of the lease by the OA who was then standing in the shoes of the chargor. I also find that the bank is a purchaser who had notice of the said lease agreement and hence cannot deny that the plaintiff has an interest in the said C property, and that being so, it is my decision that the plaintiff is also entitled to the order of specific performance.

With regard to the plaintiff's claim for damages, I cannot see how this has arisen. The object of an award for damages is only to give a party compensation for the damage, loss or injury that he has suffered D and thus the measure of damages has to be based on the actual damage directly from the whole transaction. Counsel for the plaintiff has not made any submission as to damages. Furthermore, from the evidence adduced, I cannot see any consequential loss suffered by the plaintiff as a result of the refusal on the part of the bank to release the issue document of title. It could have caused him to suffer anxiety and E anguish but he has not claimed that he has lost any business as a result of the lease not being registered or that he has been prevented by the bank from operating the hotel in the said building. That being the case, I cannot allow any claim for damages but I would allow the plaintiff's claim for costs which is to be paid by the second defendant, the bank.

I am not making any order against the first defendant, the OA, as F the plaintiff has abandoned its claim against her; she is also not entitled to costs.

Application allowed.

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Reported by Lindy Course

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